

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JULIUS CARTER ANDERSON,

Plaintiff,

No. CIV S-03-0817 MCE KJM P

vs.

W. HARTLEY, et al.,

Defendants.

ORDER

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Plaintiff is a California prisoner proceeding pro se with an action for violation of civil rights under 42 U.S.C. § 1983. Several matters are before the court. A hearing was held with respect to plaintiff's February 3, 2006 motion to compel and plaintiff's March 1, 2006 motion to compel on September 26, 2006. At the hearing, Deputy Attorney General Catherine Woodbridge appeared for defendants Hernandez, Morrison and Pai; plaintiff appeared telephonically.

I. Background

On September 30, 2005, the court screened plaintiff's September 17, 2004 amended complaint under 28 U.S.C. § 1915A(a). The court found that service of process was appropriate for defendants Hernandez, Morrison and Pai. The court also found that plaintiff's

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1 complaint states causes of action under the Eighth Amendment against defendants Hernandez,
2 Morrison and Pai and under the First Amendment against defendant Pai.

3 In the amended complaint, plaintiff alleges defendants Hernandez and Morrison,
4 both California Department of Corrections (CDC) correctional officers, were deliberately
5 indifferent to plaintiff's safety because they ignored a water leak in plaintiff's cell. Am. Compl.
6 at 6-8. As a result of the leak, water accumulated in plaintiff's cell causing plaintiff to slip and
7 fall in late 2001, and then again early in 2002. Id. at 8.

8 Plaintiff alleges defendant Pai, a CDC physician, was deliberately indifferent to
9 plaintiff's medical needs by abruptly terminating plaintiff's narcotic medication causing plaintiff
10 to suffer severe symptoms of withdrawal. Id. at 9, 17-18. Plaintiff claims Dr. Pai did this in
11 retaliation for plaintiff's filing a lawsuit against another prison staff member and complaining
12 about prison conditions. Id. at 17-18.

13 Defendants Morrison and Pai filed their answer on December 9, 2005. Defendant
14 Hernandez filed his answer on January 31, 2006.

15 II. Plaintiff's Request For Leave To File Second Amended Complaint

16 On January 9 and January 17, 2006, plaintiff filed motions for leave to file a
17 second amended complaint. Plaintiff's motions will be denied as plaintiff has made no attempt
18 to justify the nearly sixteen month delay in seeking leave to amend after plaintiff filed his first
19 amended complaint on September 17, 2004. See Moore v. Kayport Package Exp., Inc., 885 F.2d
20 531, 538 (9th Cir. 1989) (in determining whether to grant leave to amend, factors to be
21 considered include undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies
22 through prior amendments, undue prejudice to the opposing party and futility). Although there is
23 no indication of plaintiff's bad faith or dilatory motive, defendants would be prejudiced by the
24 further delay in litigation that would be occasioned by allowing amendment at this time. Id. At
25 the same time, the proposed amendments do not alter the nature of the claims, with one
26 exception, namely the addition of a defendant, Officer Hartley. With regard to this defendant,

1 any amendment would be futile as plaintiff's proposed second amended complaint fails to state a
2 claim against Hartley upon which relief can be granted. See 28 U.S.C. § 1915A(b)(1).

3 III. Plaintiff's February 3, 2006 Motion To Compel

4 Plaintiff asks that the court compel defendants to provide further answers to
5 several requests for discovery. Plaintiff argues that in several respects defendants' answers are
6 evasive and incomplete.

7 A. Interrogatories

8 First, plaintiff asks that defendant Morrison be ordered to provide further answers
9 to interrogatories 2 and 3. The court has reviewed Morrison's responses and finds that they are
10 responsive to the questions propounded. Mot., Ex. A at 2. Morrison will not be ordered to
11 provide further substantive responses to plaintiff's interrogatories.

12 Next, plaintiff requests that defendant Pai be ordered to provide a further answer
13 to interrogatory 3. However, the court finds that Pai's answer to interrogatory 3 is not evasive or
14 incomplete, given that the question propounded is a general question and not tailored to
15 plaintiff's medical case. Mot., Ex. B at 2. Pai will not be ordered to provide further substantive
16 responses to plaintiff's interrogatories.

17 The court, however, notes that at least some of defendants' answers to plaintiff's
18 interrogatories were not verified by defendants themselves as required by Federal Rule of Civil
19 Procedure 33(b). Defendants will be ordered to provide verifications to all answers to
20 interrogatories within twenty days.

21 B. Document Requests

22 Plaintiff requests that defendant Morrison be ordered to provide further responses
23 to requests to produce numbers 1 through 5 and 7 through 12, and that defendant Pai be ordered
24 to provide further responses to requests to produce numbers 1 through 3, 5 and 7 through 13, in
25 plaintiff's first set of document requests.

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1 Defendants Pai and Morrison assert they should not be ordered to provide further
2 responses to plaintiff's requests to produce because plaintiff did not make an attempt to "meet
3 and confer" with defendants Pai or Morrison, or their counsel, prior to filing his motion to
4 compel. Opp'n at 3:17-26. However, in this court's December 29, 2005 discovery order, the
5 parties were informed that Local Rule 37-251, which requires, among other things, that parties
6 meet and confer before a motion to compel is filed, will not apply in this case. Because plaintiff
7 is incarcerated, requiring that the parties meet and confer before the filing of a motion to compel
8 is simply not practical.¹

9 Pai and Morrison also assert that they have no access to any of the documents
10 requested by plaintiff other than the documents they have already produced. Opp'n at 4:18-19.
11 Defendants claim the documents are in the "custody, control and possession" of the CDC and if
12 plaintiff wants access to the documents he must subpoena them from CDC. Opp'n at 4:19-20.
13 At the September 26, 2006 hearing, counsel for defendants asserted that Morrison does not have
14 access to any of the documents requested because Morrison no longer works at the California
15 Medical Facility (CMF), which is the facility where the events alleged in plaintiff's amended
16 complaint occurred. However, on September 27, 2006, counsel for defendants filed a declaration
17 indicating Morrison does still work at CMF. Therefore, the court deems defendants' argument,
18 that Morrison does not have access to the documents requested, withdrawn.

19 With respect to plaintiff's request that defendant Morrison be directed to provide
20 further responses to plaintiff's requests for production of documents, the court will grant the
21 requests as to the following:

22 1. Any documents directing what actions should be taken by a correctional officer
23 at CMF if a water leak occurs in a cell. (Request Nos. 1,7, 8 & 11.)
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25 ¹ Defendants assert that plaintiff's failure to "meet and confer" is a basis to deny all of
26 the motions to compel addressed in this order. The court rejects defendants' argument with
respect to every motion to compel addressed herein.

1 2. Any documents indicating plaintiff complained to correctional officers about
2 there being a water leak in plaintiff's cell between September 2001 and March 2002. (Request
3 No. 10.)

4 3. Any documents, except for documents found in plaintiff's CDC medical file,
5 concerning injuries sustained by plaintiff when he slipped and fell in his cell on December 31,
6 2001 and January 23, 2002. (Request Nos. 4 & 9.)

7 4. Any documents that show there were plumbing problems in the P1 Housing
8 Unit at CMF between September 2001 and March 2002. (Request No. 10.)

9 Plaintiff's motion to compel further responses to his requests for production from
10 defendant Morrison will be denied in all other respects because to the extent they request more
11 information they are overbroad, vague, or not likely to lead to the discovery of admissible
12 evidence concerning plaintiff's claims against defendant Morrison. See Fed. R. Civ. P. 26(b)(1).

13 _____ With respect to plaintiff's request that defendant Pai be directed to provide further
14 responses to plaintiff's requests for production of documents, the court will order defendant Pai
15 to produce documents responsive to request to produce numbers 2 and 12, if any exist. With
16 respect to request 2, Pai need only produce documents that show guidelines for tapering inmates
17 off pain medications similar to those taken by plaintiff before defendant Pai discontinued
18 plaintiff's prescription for those drugs. If, to the best of defendant Pai's knowledge, such
19 documents do not exist at all, defendant Pai shall provide plaintiff with a declaration in which Pai
20 verifies as much. If defendant Pai does not have access to such documents, Pai shall provide
21 plaintiff with a declaration verifying such lack of access. Plaintiff's motion to compel further
22 responses to his requests for production by defendant Pai will be denied in all other respects as
23 overbroad, vague, or not likely to lead to the discovery of admissible evidence concerning
24 plaintiff's claims against defendant Pai.

25 _____ Finally, defendants assert that they have subpoenaed some of the records sought
26 by plaintiff from CDC, including records from plaintiff's CDC medical file. Opp'n at 4:20-23.

At the September 26 hearing, counsel for defendants indicated she is willing to provide plaintiff with a copy of those documents. Good cause appearing, the court will order defendants Morrison and Pai to turn over any documents subpoenaed by their counsel in this action that are responsive to plaintiff's discovery requests.²

IV. Plaintiff's February 9, 2006 Motion To Compel

Plaintiff asks that defendants Morrison and Pai be ordered to respond further to requests to produce numbers 1 through 4 found in plaintiff's second request for production of documents. Defendants Morrison and Pai assert a number of objections. The court finds that the requests found in plaintiff's second request for production are either too vague, overbroad or are not likely to lead to the discovery of admissible evidence. *Id.* Plaintiff's February 9, 2006 motion to compel will be denied in its entirety.

V. Plaintiff's March 1, 2006 Motion To Compel

In his third motion to compel, plaintiff seeks a further response to four other requests to produce. In light of the fact that the court is ordering defendants to produce documents in response to plaintiff's February 3, 2006 motion to compel, the court will not order a further response as a result of the March 1, 2006 motion, as much of the information sought is the same. To the extent it is not, plaintiff's requests to produce are overbroad, vague, or not likely to lead to the discovery of admissible evidence. *Id.*

VI. Plaintiff's March 1, 2006 Motion For An Extension Of Time To Conduct Discovery

Plaintiff requests an extension of time to conduct more discovery. However, plaintiff has failed to offer any reason why he needs to request more information from defendants

² Given that it is plaintiff requesting his own health records, the court need not reach the question of whether defendants' counsel's position with regard to limitations or restrictions on discovery imposed by HIPAA (Health Insurance Portability and Accountability Act), articulated at the September 26 hearing and confirmed in the September 27 filing, is well taken. The court notes, however, that HIPAA and its implementing regulations appear to provide for the disclosure of health information in litigation subject to certain straightforward preconditions. See 42 U.S.C. § 1320d *et seq.*; 45 C.F.R. § 164.512(e).

1 once his motions to compel are resolved. Plaintiff's request will be denied.

2 VII. Defendants' June 8, 2006 Motion For Summary Judgment

3 Defendants have filed a motion for summary judgment. In light of the fact that
4 the court is ordering defendants to provide further discovery responses, defendants' motion will
5 be denied without prejudice to renewal no earlier than sixty days, and no later than ninety days,
6 from the date of this order. Defendants may renew their motion simply by informing the court of
7 such renewal in a written notice. The court also will vacate the dates established in the court's
8 December 29, 2005 scheduling order for the filing of pretrial statements, pretrial conference, and
9 trial. Those dates will be reset, if necessary after any motions for summary judgment are
10 resolved.

11 VIII. Plaintiff's July 6, 2006 Motion To Compel

12 On June 21, 2006, defendants Morrison and Pai sent plaintiff supplemental
13 responses to plaintiff's first request for production of documents numbers 4 and 6. Plaintiff's
14 motion objects to the supplemental responses as incomplete and evasive. On December 29,
15 2005, plaintiff was informed that all motions to compel discovery had to be filed by April 14,
16 2006. In any case, plaintiff's objections to defendant Morrison and Pai's supplemental responses
17 are not directed solely to the supplemental responses, but stem from the nature of defendants'
18 initial responses. To the extent plaintiff raised his objections in earlier motions to compel they
19 are addressed above. To the extent he did not, plaintiff's motion is not timely and the court finds
20 there is not good cause to allow consideration of the motion beyond the discovery cutoff.

21 IX. Plaintiff's August 16, 2006 Request For The Appointment Of Counsel

22 Finally, plaintiff has requested the appointment of counsel. The United States
23 Supreme Court has ruled that district courts lack authority to require counsel to represent
24 indigent prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298
25 (1989). In certain exceptional circumstances, the court may request the voluntary assistance of
26 counsel under 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991);

1 Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990). In the present case, the court
2 does not find the required exceptional circumstances. Plaintiff's request for the appointment of
3 counsel therefore will be denied.

4 In accordance with the above, IT IS HEREBY ORDERED that:

5 1. Plaintiff's January 9 and January 17, 2006 motions for leave to file a second
6 amended complaint are denied.

7 2. Defendants shall provide verifications to all of their answers to plaintiff's
8 interrogatories as required under Federal Rule of Civil Procedure 33(b) within twenty days of this
9 order.

10 3. Plaintiff's February 3, 2006 motion to compel is granted in part and denied in
11 part as follows:

12 A. Within twenty days of this order:

13 i. Counsel for defendant Pai and Morrison shall provide plaintiff
14 with documents obtained through subpoena in this action that are
15 responsive to any of plaintiff's requests to produce.

16 ii. Defendant Morrison shall produce:

17 a. Any documents directing what actions should be taken
18 by a correctional officer at the California Medical Facility if
19 a water leak occurs in a cell.

20 b. Any documents indicating plaintiff complained to
21 correctional officers about there being a water leak in
22 plaintiff's cell between September 2001 and March 2002.

23 c. Any documents concerning injuries sustained by
24 plaintiff, except for documents found in plaintiff's
25 California Department of Corrections medical file, when
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1 plaintiff slipped and fell in his cell on December 31, 2001
2 and January 23, 2002.

3 d. Any documents that show there were plumbing
4 problems in the P1 Housing Unit at the California Medical
5 Facility at any time between September 2001 and March
6 2002.

7 iii. Defendant Pai shall produce:

8 a. Documents responsive to request to produce number 12
9 found in plaintiff's first request for production of
10 documents.

11 b. Documents responsive to request to produce number 2
12 found in plaintiff's first request for production of
13 documents, but limited to guidelines for tapering inmates
14 off pain medications similar to those taken by plaintiff
15 before defendant Pai discontinued plaintiff's prescription
16 for those drugs.

17 c. If, to the best of defendant Pai's knowledge, these
18 documents do not exist, or defendant Pai does not have
19 access to such documents, Pai shall provide plaintiff with a
20 declaration verifying as much.

21 B. Plaintiff's motion is denied in all other respects.

22 4. Plaintiff's February 9, 2006 motion to compel is denied.

23 5. Plaintiff's March 1, 2006 motion to compel is denied.

24 6. Plaintiff's March 1, 2006 motion for an extension of time to conduct discovery

25 is denied.

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1 7. Defendants' June 8, 2006 motion for summary judgment is denied without
2 prejudice to renewal no earlier than sixty days from the date of this order and no later than ninety
3 days.

4 8. The dates established in the court's December 29, 2005 scheduling order for
5 the filing of pretrial statements, pretrial conference, and trial are vacated to be reset if and when
6 necessary.

7 9. Plaintiff's July 6, 2006 motion to compel is denied.

8 10. Plaintiff's August 16, 2006 request for the appointment of counsel is denied.

9 DATED: September 29, 2006.

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12 UNITED STATES MAGISTRATE JUDGE
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